UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

WALTER DANIEL, individually and as personal representative of the estate of REBEKAH DANIEL, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	CASE NO. 15-5748 RJB ORDER ON DEFENDANT'S MOTION TO DISMISS

This matter comes before the Court on Defendant United State's Motion to Dismiss. Dkt. 6. The Court has considered the pleadings filed in support of and in opposition to the motion and the file herein.

Plaintiff, individually and on behalf of the estate of his late wife, filed this Federal Tort Claim Act ("FTCA") case against the United States asserting claims for medical negligence, corporate negligence, and wrongful death based on health care provided at U.S. Naval Hospital Bremerton ("NHB") in connection with the death of Lieutenant Rebekah Daniel shortly after she gave birth to a child.

The Defendant now moves for dismissal of this case, arguing that the Court does not have subject matter jurisdiction because the United States has sovereign immunity. Dkt. 6. For the reasons set forth below, the motion should be granted.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

A. BACKGROUND FACTS

At the time of her death on March 9, 2014, Lt. Daniel was a commissioned officer on active duty status in the United States Navy. Dkt. 1. She was stationed at NHB as a labor and delivery nurse. *Id.*, at 3. Her husband, the Plaintiff, Walter Daniel, was a Lieutenant Commander in the United States Coast Guard. *Id*.

In June of 2013, Lt. Daniel submitted her resignation, indicating that she wished to detach from the Navy in May 2014. Dkt. 6-3, at 3-5. Her resignation was approved, and separation orders were issued with an Estimated Detachment Date of May 2014. *Id.*, at 2 and 9-11. Her separation orders provided that "[w]hen directed by reporting senior, detach May 14." *Id.*, 9. Those orders also specified that separation processing must occur, and "upon completion and when directed detach." *Id.* Prior to her death, Lt. Daniel had not initiated separation processing. Dkt. 6-1. She was receiving her regular pay and benefits, including accumulation of annual (vacation) leave and creditable service toward retirement. *Id.*

Lt. Daniel checked into NHB as a patient on March 8, 2014 and went into labor on March 9, 2014. Dkt. 1, at 3. She was off duty at the time, and was not serving on a military mission. *Id.* Her pregnancy was considered a low-risk pregnancy. *Id.* She had a healthy baby girl at 3:38 PM by vaginal delivery. *Id.*, at 4. A few minutes later, she began to have postpartum bleeding. *Id.* Lt. Daniel was pronounced dead at 7:34 PM, four hours after she gave birth. *Id.*, at 6.

Plaintiff asserts that Lt. Daniel bled to death because her healthcare team failed to follow specific well-known standards of care for postpartum hemorrhage. Dkt. 1.

NHB is a military hospital that provides care to service members, retirees, their eligible dependents, and some disabled veterans. Dkts. 1, at 7 and 6-1, at 4. It does not provide care to members of the general public. Dkt. 6-1.

B. PROCEDURAL HISTORY

On April 1, 2015, Plaintiff filed an administrative claim with the Defendant. Dkt. 1. Defendant denied the claim on April 23, 2015. *Id.* Plaintiff filed this case on October 15, 2015. *Id.*

C. MOTION TO DISMISS, PLAINTIFF'S RESPONSE, AND DEFENDANT'S REPLY

Defendant moves to dismiss the claims against it for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Defendant asserts that it enjoys sovereign immunity except to the extent that it consents to be sued. *United States v. Mitchell*, 463 U.S. 206, 212 (1983). The FTCA constitutes a partial waiver of this sovereign immunity. 28 U.S.C § 2679(b). Defendant argues that the FTCA is not applicable to this case because the rule announced in *Feres v. United States*, 340 U.S. 135 (1950) bars claims arising out of injuries that are "incident to service" in the military. Dkt. 6.

Defendant argues that because Rebekah Daniel was an active duty service member receiving care at a military hospital when she died, the analogous cases, the Ninth Circuit's four-factor test, and the policy rationales underlying *Feres* support the application of *Feres* in this case. Dkt. 6.

In response, Plaintiff argues that *Feres* should not apply to medical malpractice cases, particularly those involving pregnant service members, because cases which apply the *Feres* bar

to medical malpractice claims "cannot be reconciled with the analysis adopted by the Ninth Circuit." Dkt. 8. Plaintiff further contends that *Feres* does not apply to this case because, although Ninth Circuit cases are arguably inconsistent, "the Ninth Circuit's analysis of the rationales and factors to be considered" support denial of Defendant's motion. *Id*. Plaintiff points out that although this Court is bound by Ninth Circuit and United States Supreme Court precedent, "the Ninth Circuit sitting en banc has not considered the *Feres* rule in the present context." *Id.* Plaintiff preserves an argument that *Feres* should be reversed or modified, while recognizing that such an action can only be taken by the appellate courts. *Id.*

Defendant filed a reply in support of the Motion to Dismiss. Dkt. 10. In it, Defendant disputes Plaintiff's assertion that *Feres* should not apply to medical malpractice claims by pointing out that both the Ninth Circuit and the Supreme Court have applied *Feres* in such cases, and that those cases have upheld the validity of applying the *Feres* doctrine. *Id.* Defendant also argues that the four-factor test and policy rationales support application of *Feres* under these circumstances. *Id.*

II. DISCUSSION

A. STANDARD FOR MOTION TO DISMISS

A complaint must be dismissed under Fed.R.Civ.P.12(b)(1) if, considering the factual allegations in the light most favorable to the plaintiff, the action: (1) does not arise under the Constitution, laws, or treaties of the United States, or does not fall within one of the other enumerated categories of Article III, Section 2, of the Constitution; (2) is not a case or controversy within the meaning of the Constitution; or (3) is not one described by any jurisdictional statute. *Baker v. Carr*, 369 U.S. 186, 198 (1962); *D.G. Rung Indus., Inc. v. Tinnerman*, 626 F.Supp. 1062, 1063 (W.D. Wash. 1986); *see* 28 U.S.C. §§ 1331 (federal

question jurisdiction) and 1346 (United States as a defendant). When considering a motion to dismiss pursuant to Rule 12(b)(1), the court is not restricted to the face of the pleadings, but may review any evidence to resolve factual disputes concerning the existence of jurisdiction. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989); *Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983). A federal court is presumed to lack subject matter jurisdiction until plaintiff establishes otherwise. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994); *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). Therefore, plaintiff bears the burden of proving the existence of subject matter jurisdiction. *Stock West*, 873 F.2d at 1225; *Thornhill Publishing Co., Inc. v. Gen'l Tel & Elect. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979).

B. SOVEREIGN IMMUNITY AND THE FTCA

The United States, as sovereign, is immune from suit unless it consents to be sued. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980); *Cato v. United States*, 70 F.3d 1103, 1107 (9th Cir. 1995). If a claim does not fall squarely within the strict terms of a waiver of sovereign immunity, a district court is without subject matter jurisdiction. *See, e.g., Mundy v. United States*, 983 F.2d 950, 952 (9th Cir. 1993).

The FTCA is the exclusive remedy for state law torts committed by federal employees within the scope of their employment. 28 U.S.C. § 2679(b)(1). The FTCA is a limited waiver of sovereign immunity, rendering the United States liable for certain torts of federal employees. *See* 28 U.S.C. § 1346(b). The FTCA provides,

> Subject to the provisions of chapter 171 of this title, the district courts, . . ., shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private

> person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1). The statute specifically excludes military service related injuries for claims arising out of "combatant activities," 28 U.S.C. § 2680(j), and claims arising in foreign countries, 28 U.S.C. § 2680(j).

The Supreme Court significantly broadened the "combatant activities" exception in *Feres v. United States*, 340 U.S. 135 (1950). *See also Costo v. United States*, 248 F.3d 863, 866 (9th Cir. 2001). The *Feres* court held that FTCA waiver of sovereign immunity does not apply to the claims "for injuries to servicemen where the injuries arise out of or are incident to service." *Id.*, at 146. This doctrine is referred to as the *Feres* doctrine. *Costo*, at 866. The *Feres* doctrine is based on three policy rationales:

> (1) the distinctively federal nature of the relationship between the government and members of its armed forces, which argues against subjecting the government to liability based on the fortuity of the situs of the injury; (2) the availability of alternative compensation systems; and (3) the fear of damaging the military disciplinary structure.

Ritchie v. United States, 733 F.3d 871, 874 (9th Cir. 2013)(*quoting Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 671-72 (1977)).

For the past sixty-six years, the *Feres* doctrine and its policy considerations have "been criticized by 'countless courts and commentators' across the jurisprudential spectrum." *Ritchie*, at 874; *Costo*, at 866. (9th Cir. 2013). "However, neither Congress nor the Supreme Court has seen fit to reverse course." *Ritchie*, at 874. Due to the heavy criticism of the doctrine and its policy considerations, the Ninth Circuit applies a four factor test to determine whether a service member's injury is "incident to service." *Costo*, at 866. The four factors are:

> (1) the place where the negligent act occurred, (2) the duty status of the plaintiff when the negligent act occurred, (3) the benefits accruing to the plaintiff because

> of the plaintiff's status as a service member, and (4) the nature of the plaintiff's activities at the time the negligent act occurred.

Costo, at 867 (*internal citation omitted*). None of these factors are dispositive. *McConnell v. United States*, 478 F.3d 1092, 1095 (9th Cir. 2007) (*internal citation omitted*). Rather than seizing on any particular combination of factors, the focus is on the totality of the circumstances. *Id*.

Additionally, because the Ninth Circuit has "reached the unhappy conclusion that the cases applying the *Feres* doctrine are irreconcilable," a "comparison of fact patterns to outcomes in cases that have applied the *Feres* doctrine is the most appropriate way to resolve *Feres* doctrine cases." *Schoenfeld v. Quamme*, 492 F.3d 1016, 1019 (9th Cir. 2007)(*internal quotation marks omitted*). Therefore, courts "examine the Ninth Circuit cases that are most factually analogous to the case at bar to determine whether the *Feres* doctrine bars [Plaintiff Daniel's] suit." *Id.*, at 1019-1020.

C. APPLICATION OF *FERES* DOCTERINE

For clarity, the Ninth Circuit's most favored method of *Feres* analysis (analogous cases) will be considered first, followed by the four-factor test established by the Ninth Circuit, then by the disfavored policy rationales.

1. Other Ninth Circuit Cases

The Ninth Circuit compares "fact patterns to outcomes in cases that have applied the *Feres* doctrine." *Costo*, at 867. Similar medical malpractice claims arising out of injury to active duty service members from care received at a military hospital have been found to be barred by *Feres*. *Persons v. United States*, 925 F.2d 292 (9th Cir. 1991); *Atkinson v. United States*, 825 F.2d 202 (9th Cir. 1987); *Veillette v. United States*, 615 F.2d 505 (9th Cir. 1980).

In *Persons*, the court found that although the service member was off-duty, he "enjoyed the use of the naval hospital solely by virtue of his status as a serviceman and the doctors who treated him were subject to military orders." *Persons,* at 296. The *Persons* court noted, "courts have consistently accorded these factors decisive weight in determining whether activity was 'incident to service,'" and so, it held that medical malpractice claims against the U.S. were barred by *Feres*. *Id.* That court found that the *Feres* doctrine barred negligence claims, and that "this is especially true in cases alleging medical malpractice in a military facility." *Id.*

The *Atkinson* court decided that although a medical malpractice claim arising out of negligent prenatal care did not support application of *Feres* according to the third *Feres* rationale, military discipline, the other two *Feres* rationales supported its application. *Atkinson*, at 206. It held the *Feres* doctrine barred suit by a service woman asserting that negligent medical treatment at a military healthcare facility caused her child to be stillborn. *Id.*

In *Veillette*, the Ninth Circuit found that since the service member's death was attributable to the negligence of Navy hospital personnel, the injury was "incident to service" even though civilians also had access to that facility. *Veillette*, at 507. The *Veillette* court held that negligence claims against employees of military hospitals are barred by the *Feres* doctrine. *Id.*

The case law supports the application of the *Feres* doctrine to medical malpractice cases brought by service members, or their heirs, against military hospital personnel. Lt. Daniel's care should be regarded as "incident to service," and under binding Ninth Circuit precedent, her claims are barred by *Feres*.

2. Ninth Circuit's Four Factor Test

a. *The Place where the Negligent Act Occurred*

In evaluating this factor, courts consider whether the location is open to the public. *See, e.g., Dreier v. United States,* 106 F.3d 844. 853 (9th Cir. 1996). In this case, treatment took place at NHB, a Naval medical facility. Dkt. 6-1. Only active duty service members and their dependents may receive their care at that facility. *Id.* at 11. This factor weighs in favor of a *Feres* bar. However, this factor is not determinative, and precedent indicates that "where the nature of the plaintiff's activities at the time of injury are only minimally related to [her] military service, we have declined to give much weight to this factor." *Schoenfeld,* at 1023. Consequently, the fourth factor may have an effect on analysis of the first factor.

b. *Lt. Daniel's Duty Status*

Lt. Daniel was an active duty service member at the time of treatment, and was not on leave or furlough. Dkt 6-1 at 8. This factor also weighs in favor of a *Feres* bar. However, if the service member is not "engaged in military activity" at the time of injury, "duty status is at best marginally relevant to the *Feres* analysis." *Schoenfeld,* at 1023. "The important question is whether the service member on active duty status was engaging in an activity that is related in some relevant way to his military duties." *Johnson v. United States,* 704 F.2d 1431, 1438 (9th Cir. 1983). Again, to determine whether this factor will be strongly considered, the nature of the service member's activity under the fourth factor is relevant.

c. *Benefits Accruing to Lt. Daniel because of her Status as a Service Member*

"Benefits," under the third factor, can encompass benefits received both before and after injury, including the benefit of being able to participate in the activity that led to injury and any compensation arising out of that injury. *Schoenfeld,* at 1024. Lt. Daniel received her care at NHB because of her status as a service member. Additionally, her family received benefits following her death because she was on active duty status. This factor weighs in favor of applying the

Feres bar. It is not dispositive, however, as the payment of benefits alone does not preclude a service member from recovery under the FTCA. *See, e.g., Schoenfeld* at 1024.

d. *Nature of Lt. Daniel's Activities at the Time the Negligent Act Occurred*

In analyzing this fourth factor, courts consider whether the activities of the service member are "meaningfully distinguishable from those of a civilian." *Schoenfeld*, at 1025. Although a pregnant service woman would expect to receive care at a military hospital that is substantially similar to the care a civilian would receive at a civilian hospital, it is relevant that the service woman is at that particular military facility being treated by military personnel because of her status in the military. *See, e.g., Persons,* at 296. In its analysis of the fourth factor in *Jackson v. United States,* the Ninth Circuit stated as follows: "[O]btaining medical care is neither inherently military nor inherently civilian. However, we have held that *Feres* bars suits for medical malpractice even when the treatment was not for military-related injuries." *Jackson v. United States*, 110 F.3d 1484 (9th Cir. 1997). This factor also weighs in favor of applying *Feres*.

3. *Feres* Policy Considerations

The *Feres* doctrine bars recovery under the FTCA for injuries that are "incident to service" based on three policy rationales:

> (1) the distinctively federal nature of the relationship between the government and members of its armed forces, which argues against subjecting the government to liability based on the fortuity of the situs of the injury; (2) the availability of alternative compensation systems; and (3) the fear of damaging the military disciplinary structure.

Ritchie, at 874. The Ninth Circuit has "shied away from attempts to apply these policy rationales." *Costo,* at 867. They are broadly encompassed by the four-factor test that the Ninth Circuit favors in making determinations on the applicability of the *Feres* bar.

The first policy consideration, the situs of the injury, is intended to offer some uniformity in light of the global nature of U.S. military operations. *United States v. Johnson*, 481 U.S. 681 (1987). The idea is that active duty service men and women will be treated the same regardless of where the alleged negligence took place. Because Lt. Daniel was an active duty service woman being treated at a military facility, this policy consideration favors application of *Feres.* However, as discussed in relation to the first factor of the Ninth Circuit's test, military status and location of alleged negligence may have diminished relevance in relation to other considerations. *See, e.g., Schoenfeld,* at 1023.

The second consideration recognizes the existence of "generous statutory disability and death benefits" available to service members. *Johnson*, 481 at 689. Lt. Daniel's heirs have received, and will continue to receive, these benefits. Dkt. 6-1. As discussed under the third factor of the Ninth Circuit's test, this policy consideration favors application of the *Feres* bar, but does not necessarily preclude recovery under the FTCA.

The third policy, military discipline, centers on "the need to avoid the inquiry into military orders," and is specifically concerned with officers testifying in court with regard to the actions and decisions of other officers. *Id*. at 876. The goal is to limit involvement by the judiciary into "sensitive military affairs at the expense of military discipline and effectiveness." *Johnson,* at 690 (*internal citations omitted).* In evaluating this rationale, the Ninth Circuit has distinguished the doctor-patient relationship in medical malpractice cases from the military supervisor-subordinate relationship in other FTCA claims. *Id.* at 876-77. Courts also focus on the status of the alleged victim rather than the military status of the alleged tortfeaser in *Feres* cases. *Johnson,* at 686. The facts of this case do not involve inquiry into the military orders of a superior to a subordinate, but rather into the treatment given by a doctor to a patient of the kind

that the doctor might also provide to a civilian. Furthermore, Lt. Daniel was not under orders at the time of her treatment, so any impact on military discipline would be remote. This consideration weighs against application of *Feres*.

Feres, and the policy rationales for the *Feres* bar, have resulted in much criticism and inconsistency. The third rationale, which pertains to military discipline, is emphasized as the most important of the three, and military discipline is only minimally impacted by this case. *See, e.g., Ritchie,* at 874. However, the other two *Feres* rationales counsel that the Plaintiff's claims are barred.

D. CONCLUSION

The Ninth Circuit has relied on two methods – analogous case analysis and the four-factor test – to alleviate some of the inconsistency resulting from application of the *Feres* policy considerations. Both of these methods favor application of the *Feres* doctrine. Absent intervening controlling authority, the undersigned is bound by the decisions of the Ninth Circuit and the Supreme Court. "[U]nless and until Congress or the Supreme Court choose to confine the unfairness and irrationality that *Feres* has bred," *Ritchie*, at 878, the doctrine applies here. Regretfully, this suit is barred by *Feres*. Defendant's motion to dismiss should be granted.

III. ORDER

Therefore, it is hereby **ORDERED** that:

Defendant United States' Motion to Dismiss (Dkt. 6) **IS GRANTED**. This case is **CLOSED**.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 21st day of January, 2016.

ROBERT J. BRYAN
United States District Judge